Tillford Contractors *and* Donald Battoe. Case 26–CA–16111

April 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On November 21, 1994, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent discharged Donald Battoe because he engaged in union and/or protected concerted activity. The judge concluded that the Respondent's owner, Lewis Tillford, lawfully discharged Battoe for what Tillford considered to be insubordination. For the reasons given below, we find that Battoe was unlawfully discharged for engaging in conduct which was concerted and protected.

The facts are largely undisputed. On February 2, 1994, Donald Battoe and Kevin Miller were referred to the Respondent's jobsite by the Plumbers and Pipefitters Local 184. The Union designated Battoe the job steward. The Respondent made Miller the working foreman.[1] Battoe and Miller were initially supervised by Area Foreman Lynn Simmons. Around February 11, Simmons informed Miller that he would be bringing Donald Baucum to the site to act as a materials expediter. Miller testified that he assumed he would be supervising Baucum. When Baucum arrived on February 14, however, Miller observed that his actions were more consistent with those of an area foreman than a materials expediter. Accordingly, several hours after his arrival, Miller asked Baucum if he was replacing Simmons as the area foreman. Baucum responded that he was just told to be at the site. Miller repeated the question later that day and the following morning. Each time, he received the same response.

On February 15, Miller told Battoe that he thought the collective-bargaining agreement prohibited the Respondent from assigning an employee to be area foreman over more than one job. If correct, that would mean the Respondent's assignment of Baucum as their area foreman would arguably violate the agreement since he was already an area foreman at another job. Miller also told Battoe that he had asked Baucum three times what his position was and Baucum had refused to tell him.

Battoe then attempted to determine Baucum's job status. Battoe testified that he asked Baucum if he was their area foreman, to which Baucum merely replied that Tillford had sent him to the job. Battoe then told Baucum, ''If you're our area foreman, ain't you area foreman on two more different jobs? . . . I believe in this agreement, that you can't be area foreman on two or three jobs,'' and he threatened to bring internal union charges against him for violating the collective-bargaining agreement. Miller, who overheard the conversation, testified that Battoe also said ''You've got no goddamn business being here,'' and ''The best thing you could do is get the hell away from us.''[2]

Baucum gave a different account than either Battoe or Miller of exactly what was said during the conversation. According to Baucum, Battoe first asked him ''What are you doing here?,'' and he replied that Tillford had sent him to the job to help Miller. Battoe then said that he had no business being on the job, and that he could not be their area foreman because he was area foreman at another of the Respondent's jobs. Baucum could not remember whether Battoe specifically mentioned the collective-bargaining agreement.

Following the conversation, Baucum attempted to contact Union Business Agent Benny Brown to determine whether the contract prohibited his being on the job. After he was unable to reach Brown, he went to Tillford's office and asked to review a copy of the collective-bargaining agreement. He and Tillford examined the contract and determined that it allowed the Respondent to place Baucum at the jobsite as an area foreman.

Tillford testified that he decided to fire Battoe after Baucum told him that Battoe said he had no ''goddamn'' business being on the job. He contacted Benny Brown, however, before carrying out his decision. He learned for the first time from Brown that Battoe was a job steward. He remained resolute in his decision to discharge Battoe however, because he could not abide an employee ''talking back'' and ''sticking his nose where he had no business.''

Battoe, in attempting to ascertain Baucum's job status, was engaged in protected concerted activity. The information he sought was necessary in order to determine whether the Respondent was violating the collective-bargaining agreement. When an employee makes an attempt to enforce a collective-bargaining agree-

[1] There is no contention that Miller was a supervisor within the meaning of Sec. 2(11) of the Act.

[2] The judge found that credibility is not an issue because there is no factual dispute. Nevertheless, he specifically credited the testimony of Miller and Tillford.

ment, he is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act. *Interboro Contractors*, 157 NLRB 1295 (1966). An employee making such a complaint need not specifically refer to the collective-bargaining agreement. As long as the nature of the complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. *Bechtel Power Corp.*, 277 NLRB 882, 884 (1985); *Roadway Express*, 217 NLRB 278, 279 (1975); *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984).

The judge found that Battoe did not pose the question of Baucum's position in a reasonably clear manner. We disagree. According to Miller, whose testimony was credited by the judge, Battoe specifically asked Baucum whether he was their area foreman. Miller also testified that Battoe threatened to file internal union charges against Baucum for violating the collective-bargaining agreement. Furthermore, Baucum testified that Battoe told him he could not be their area foreman because he was already an area foreman on another job. Baucum's subsequent attempts to determine whether his presence on the site violated the contract indicate that he understood the issue was a contractual one.[3] Thus, we find that Battoe's complaint did concern a reasonably perceived violation of the agreement and it was posed reasonably clearly to Baucum.

The judge also found that the Respondent was unaware of Battoe's status as a steward when it made the decision to discharge him. First, Battoe's conduct of enforcing the contract is protected concerted activity even if engaged in by an employee who is not a steward. Second, by the time the Respondent actually carried out the discharge it was aware that Battoe was the Union's steward and that it was discharging him for his activities as a steward.

Having found that Battoe was engaged in protected concerted activity, we turn to the question whether he in some manner lost the protection of the Act.

We find that Battoe did not engage in conduct which removed him from the Act's protection. His comments to Baucum that he had ''no goddamn business'' on the job and that ''the best thing [he] could do was to get the hell away,'' were directly related to his protected and concerted activity of attempting to enforce the collective-bargaining agreement. In order for an employee engaged in such activity to forfeit his Section 7 protection his misconduct must be so ''flagrant, violent, or extreme'' as to render him unfit for further service. *United Cable Television Corp.*, 299 NLRB 138 (1990), quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). It is undisputed that Battoe did not threaten or engage in acts of violence. Further, although the Respondent characterizes Battoe's conduct as insubordinate, at most, his conduct was profane and disrespectful. It is well established that some profanity and even defiance must be tolerated during confrontations over contractual rights.[4] We find that Battoe's conduct was not so flagrant or extreme as to remove him from the Act's protection. We therefore find that the Respondent discharged Battoe for engaging in protected activity in violation of Section 8(a)(3) and (1) of the Act.[5]

CONCLUSIONS OF LAW

1. The Respondent, Tillford Contractors, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(3) and (1) of the Act by its discriminatory termination of Donald Battoe on February 16, 1994, because he engaged in the protected and concerted activity of seeking enforcement of provisions of the collective-bargaining agreement.

3. The unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act, we shall order it to

[3] In its brief in support of the judge's decision, the Respondent asserts that Battoe did not make reference to the collective-bargaining agreement in his conversation with Baucum. We note, however, that Battoe's testimony that the contract was referred to is uncontradicted and to some extent corroborated by Miller's testimony. Baucum merely testified that he could not remember whether Battoe referred to the agreement and Miller testified that Battoe referred to the agreement when he threatened to file internal union charges against Baucum.

[4] See, for example, *NLRB v. Chelsea Laboratories*, 825 F.2d 680, 683 (2d Cir. 1987) (protection not lost because grievance presented in a rude and disrespectful manner); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965) (conduct protected even though employee called his manager a ''horse's ass''); and *Severance Tool Industries*, 301 NLRB 1166, 1169 (1991) (protection not lost because employee raised his voice at respondent's president and called him a ''son of a bitch'').

[5] Member Cohen finds that Battoe invoked the collective-bargaining agreement. In this regard, Battoe testified that he expressly referred to the contract in his conversation with Baucum. (Baucum does not deny the reference.) More importantly, the person who made the discharge decision (Tillford) knew that Battoe was invoking the contract. Indeed, Baucum and Tillford examined the contract to see if Battoe's claim was correct. Tillford concluded that Battoe's claim was incorrect, and proceeded to discharge him for forcefully making that claim. Irrespective of whether Baucum was correct in his claim, it is clear that the claim was made in good faith. In these circumstances, the discharge was unlawful. Finally, under any version of the February 15, 1994 conversation, Battoe's comments to Baucum did not exceed the Act's protections. Thus, Member Cohen agrees with his colleagues that the Respondent violated the Act.

cease and desist, and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, we shall order the Respondent to reinstate Donald Battoe and to make him whole for the losses he sustained as a result of the discrimination against him, less interim earnings. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, having found that the Respondent instructed the Union not to refer Donald Battoe for further employment, we shall order the Respondent to notify the Union, in writing, that it will accept him for employment in the future. In addition, because the project has been completed and the employees are dispersed, we shall order the Respondent to mail copies of the notice marked ''Appendix'' to all individuals who were employed on the project. See, e.g., *Wheelco Co.*, 260 NLRB 867, 868 fn. 7 (1982).

ORDER

The National Labor Relations Board orders that the Respondent, Tillford Contractors, Murray, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees because they engage in union or protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Donald Battoe immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for losses he sustained as a result of the discrimination against him, with interest, as set forth in the remedy section of this decision.

(b) Notify the Plumbers and Pipefitters Local 184, in writing, that it will accept Donald Battoe for employment if he is referred to it in the future.

(c) Remove from its files any reference to the unlawful discharge and notify Donald Battoe, in writing, that this has been done and that the discharge will not be used against him in any way.

(d) Copies of the attached notice marked ''Appendix''[6] provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be mailed to Donald Battoe and the employees employed by the Respondent at the Murray, Kentucky project.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate employees because they engage in union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Donald Battoe immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for losses he sustained because of the discrimination against him, with interest.

WE WILL notify the Plumbers and Pipefitters Local 184, in writing, that we will accept Donald Battoe as an employee if he is referred to us in the future.

WE WILL notify Donald Battoe that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

TILLFORD CONTRACTORS

Rosalind Eddins, Esq., for the General Counsel.
Larry R. Downs, Esq., for Respondent Tillford Contractors.[1]

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried in Paducah, Kentucky, on August 9, 1994. The charge in this proceeding was filed by Battoe, an individual, on March 28, 1994, and a complaint and notice of hearing issued on May 27, 1994. The complaint alleges that the Respondent terminated Donald Battoe, a union steward, for union and/or protected concerted activity in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] Name as it appears in the complaint and formal papers.

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a corporation with an office and place of business in Murray, Kentucky, has been engaged in plumbing contracting.

During the 12-month period ending April 30, 1994, Respondent, in conducting its business operations purchased and received at its facility goods valued in excess of $50,000 directly from points located outside of the State of Kentucky.

At all material times, Respondent has been and employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

At all times material, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local Union No. 184 has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is a plumbing, heating, and air-conditioning contractor and on the average employs 40 to 50 pipefitters. Respondent's pipefitters are members of Plumbers and Pipefitters Local 184, and Respondent has had a contract with this local since 1956.

Respondent was engaged in remodeling the mechanical room at a hospital in Murray, Kentucky, in February 1994. Donald Battoe was referred from the local along with Kevin Miller on February 2, 1994. Respondent made Miller the foreman and the Union designated Battoe as job steward. On February 15, two other pipefitters had been referred to the job, David Coleman and Zane Story.

Lewise (Ed) Tilford, Respondent's president and owner of the Company since 1957, initially assigned Lynn Simmons to oversee the project. Simmons did not spend the entire day onsite and Tilford decided that more supervision was required. Accordingly, he assigned Ralph Baucom as the onsite superintendent around February 14. Baucom reviewed blueprints with Miller, moved around the job with Miller, and generally observed. He did not directly address any of the employees.

The testimony reflects while on the second day on the job, Battoe approached Baucom, it was Baucom's second day on the job, and asked him what he was doing there, Baucom told Battoe he had been sent to the job by Tilford and Simmons. Miller testified that he witnessed the conversation between Battoe and Baucom. He further testified that at one point Battoe told Baucom that the best thing he could do was to turn around and get the hell away. This statement was made after Battoe had informed Baucom that he had no business on the job, and that Simmons had no business on the job.

Baucom reported this incident to Tilford who determined that he could not tolerate backtalk so he made the determination to fire Battoe. The reason given for the termination was insubordination, and Simmons gave Battoe his check on February 16, and removed Battoe from the job.

Prior to the termination, Tilford contacted Union Representative Benny Brown and advised him of the decision to terminate Battoe. Brown wasn't in, and being out of town Tilford left a message with the secretary to have Brown return the call. Brown talked to Tilford on the telephone that night and at this point Tilford learned that Battoe was the shop steward on the job.

Tilford allowed Battoe to work an extra day after learning from Brown that Battoe was the shop steward. The extra day given to Battoe was Tilford's way of allowing Brown, who was out of town, to investigate the situation and voice any problems if he found such.

The testimony reflects that Battoe when questioning Baucom was attempting to ascertain whether Baucom was the area foreman. Miller had questions as to whether Baucom could be the area foreman over more than one job. He discussed this with Battoe. Miller questioned Battoe with respect to article 6, section 3(c) of the contract, which deals with pay rates for supervision.

Benny L. Brown who, is the business manager for Local 184, has been such for 9-1/2 years. Brown corroborated Tilford, with respect to Tilford's talking to him and telling Brown that Battoe had told the superintendent that they didn't need him on the job, and they were handling the job all right. According to Brown, Tilford told him he wasn't going to tolerate this and Brown asked him if he could wait until he got home the next day before any action was taken. Tilford testified that he told Brown he was firing Battoe for ''Talking back, smarting off to the supervision, and bad mouthing supervision.''

Conclusion and Analysis

The record reflects that for almost 40 years, Respondent and the Union have enjoyed an excellent labor management relationship devoid of any antiunion animus or any history of unfair labor practices.

Furthermore, Tilford's unrefuted testimony is that he has never fired a shop steward. Moreover, Respondent has never been the subject of a grievance other than the one arising out of the instant situation.

It is apparent that there was some uncertainty with respect to Baucom's position and authority. The question was not posed reasonably clear by Battoe. Rather, Battoe became confrontational.

It may be argued that Tilford overreacted to Battoe's conduct and that such conduct was not serious enough to warrant discharge. It is not within my province to substitute my business judgment for that of Tilford. The record as a whole does not support a finding that Tilford fired Battoe because of his union and/or concerted activity or because he was pursuing shop steward responsibilities. Tilford was unaware of Battoe's shop steward status until after his decision to terminate Battoe. I therefore conclude that Tilford terminated Battoe for what Tilford considered to be insubordination. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 cert. denied 455 U.S. 989 (1982).

Credibility is not an issue because there is essentially no factual dispute. Tilford impressed me as a credible, unambiguous witness. Furthermore, Miller, a disinterested witness, testified giving specifics and he was also credible.

I recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegations of the complaint that the Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act have not been supported by substantial evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

[Recommended Order omitted from publication.]

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.